No. 17-1104

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP.
CBS CORPORATION, AND FOSTER WHEELER LLC,
Petitioners-Defendants,

v.

ROBERTA G. DEVRIES, ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, AND WIDOW IN HER OWN RIGHT,
Respondent.

INGERSOLL RAND COMPANY,
Petitioner-Defendant,

v.

SHIRLEY MCAFEE, EXECUTRIX OF THE ESTATE OF KENNETH MCAFEE, AND WIDOW IN HER OWN RIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF RESPONDENT GENERAL ELECTRIC IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	3
I. MARITIME LAW DOES NOT SUPPORT LIABILITY FOR INJURIES ALLEGEDLY CAUSED BY PRODUCTS THE DEFENDANT DID NOT MAKE, SUPPLY, OR DISTRIBUTE	3
A. GE Provided Turbines To The Navy For The *USS Turner* Without Insulation	3
B. There Is No "Integrated Product Rule" In Maritime Law	6
II. THE THIRD CIRCUIT'S RULE NEEDLESSLY CREATES INCONSISTENCY AND UNPREDICTABILITY	8
A. Maritime Law Does Not Support Liability Based Solely On "Foreseeability."	9
B. The Third Circuit's Rule Is Neither Limited Nor Workable	12
C. A "Clear Majority" Of States Has Not Adopted Plaintiff's Proposed Rule	14
III. MARITIME LAW'S SPECIAL SOLICITUDE FOR SAILORS DOES NOT WARRANT MASSIVELY EXPANDING LIABILITY HERE	16
IV. RESPONDENTS' PROPOSED EXPANSION OF LIABILITY IS INCONSISTENT WITH THE NAVY'S PLENARY CONTROL OVER NAVAL SHIPS AND EQUIPMENT	18

TABLE OF CONTENTS—continued

Page

CONCLUSION 21

TABLE OF AUTHORITIES

CASES — Page

Adams v. *CSX Transp., Inc.*, 899 F. 2d 536 (6th Cir. 1990) 10
Anza v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) 11
Braaten v. *Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008) 14
Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 20
Dreisonstok v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974) 10
E. River S.S. Corp. v. *Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) 2, 6, 9, 11
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 17
Faddish v. *Gen. Elec. Co.*, No. Civ.A.09-70625, 2010 WL 4146108 (E.D. Pa. Oct. 20, 2010) 18, 19
Foremost Ins. Co. v. *Richardson*, 457 U.S. 668 (1982) 8
GAF Corp. v. *United States*, 932 F.2d 947 (Fed. Cir. 1991) 19
Hall v. *Atchison, Topeka & Santa Fe Ry.*, 504 F.2d 380 (5th Cir. 1974) 12
Huggins v. *Citibank, N.A.*, 585 S.E.2d 275 (S.C. 2003) 10
Jerome B. Grubart, Inc. v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) ... 9, 13
Kermarec v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) 8
Lance v. *Senior*, 224 N.E.2d 231 (Ill. 1967) 10
Liberty Mut. Ins. Co. v. *Hercules Powder Co.*, 224 F.2d 293 (3d Cir. 1955) 9

TABLE OF AUTHORITIES—continued

Page

Lindstrom v. *A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005) 7, 8, 9

Little v. *Utah State Div. of Family Servs.*, 667 P.2d 49 (Utah 1983) 10

Macias v. *Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012) 14, 15

MacPherson v. *Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) 9

May v. *Air & Liquid Sys. Corp.*, 129 A.3d 984 (Md. 2015) 10, 14

McDermott, Inc. v. *AmClyde*, 511 U.S. 202 (1994) 17

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 16

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 16

In re N.Y.C. Asbestos Litig., 59 N.E.3d 458 (N.Y. 2016) 10, 14

O'Neil v. *Crane Co.*, 266 P.3d 987 (Cal. 2012) 9, 10, 11, 15, 16

Passwaters v. *Gen. Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972) 11, 12

Quirin v. *Lorillard Tobacco Co.*, 17 F. Supp. 3d. 760 (N.D. Ill. 2014) 13

Saratoga Fishing Co. v. *J.M. Martinac & Co.*, 520 U.S. 875 (1997) 7

Schaffner v. *Aesys Techs., LLC*, No. 1901 EDA 2008, 2010 WL 605275 (Pa. Super. Ct. Jan. 21, 2010) 15

Schwartz v. *Abex Corp.*, 106 F. Supp. 3d 626 (E.D. Pa. 2015) 15

Sieracki v. *Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945), *aff'd*, 328 U.S. 85 (1946) 9

Waters-Pierce Oil Co. v. *Deselms*, 212 U.S. 159 (1909) 9

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

Page

Dan B. Dobbs et al., *The Law of Torts* (2d ed. 2018) 10

John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, HarrisMartin Columns: Asbestos, Aug. 2005..... 10

Restatement (Second) of Torts (1965) 9, 10

INTRODUCTION

This Court granted review to decide whether "products-liability defendants [can] be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute." Pet. i. In answering that question, General Electric ("GE") explained that core principles of maritime law limit a manufacturer's potential liability to products that it makes, sells, or distributes, GE Br. 16–22, and that expanding liability would be improper where, as here, the Navy exercised plenary control over warnings for products used on its ships, *id.* at 22–26. GE further showed that (i) the Third Circuit's approach introduced needless complexity and variability that clash with the simplicity and uniformity demanded by maritime law, *id.* at 26–31, and (ii) this complexity and variability would not promote the safety of sailors, *id.* at 31–40, but would introduce significant unfairness by retroactively imposing liability many decades after the fact, *id.* at 40–44.

Respondents ignore GE's showing. Their brief ("Resp. Br.") does not respond to or even mention GE's brief. That startling omission is telling because Respondents rely heavily on the assertion that "Petitioners' machines were not 'bare metal,'" Resp. Br. 1, and that Petitioners "sold the asbestos parts with the original integrated product," *id.* at 29. Contrary to these arguments, the district court granted summary judgment to GE because "there [was] no evidence that GE manufactured or supplied the insulation to which Plaintiff [DeVries] was exposed." JA 779; GE Br. 10. Because "no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from a product manufactured or supplied by [GE] such that it was a substantial factor in the develop-

ment of his illness," JA 780, DeVries had "failed to identify sufficient evidence of product identification/causation." *Id.* The court of appeals likewise accepted that GE's turbines "d[id] not contain asbestos." See Pet. App. 5a.

Given these facts, Respondents seek to avoid the question presented by redefining the relevant "product" as not only the "bare-metal" turbines that GE supplied to the Navy in the 1940s, but also the insulation the Navy installed, removed, and reinstalled over the course of subsequent decades. Resp. Br. 29. Contrary to longstanding common law principles, Respondents' approach would open the door to limitless liability based upon a sweeping view of foreseeability that this Court has ruled is an "inadequate brake" for products-liability claims under maritime law. See *E. River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 874 (1986). Under Respondents' theory, a plaintiff could argue that GE is liable for injuries caused by someone else's products because it is reasonably foreseeable that GE's turbines will operate on a Navy ship with countless other products over which third parties have both superior knowledge and control. Neither maritime law nor common law supports that result.

Nor does the special solicitude for sailors support such a vast and unpredictable expansion of potentially liable defendants. Under maritime law, Respondent DeVries is entitled to seek recovery against the parties that made, sold, or distributed the asbestos he alleges harmed him, and joint and several liability would enable him to recover the entirety of his damages from any one of them. Further, he can seek recovery from well-funded asbestos trusts and from the Veterans Administration for any injuries sustained while working for the Navy. See GE Br. 42–44. Mar-

itime law does not, however, support expansion of potential liability to third parties who did not make, sell, or distribute asbestos.

That is especially so because additional warnings would not have been permitted by the Navy and would not have enhanced safety, but instead would have competed with and undermined the Navy's system of addressing exposure to asbestos. GE Br. 36–40. Indeed, imposition of such liability decades after the fact is fundamentally unfair because the Navy reviewed and approved every product manual used in connection with the turbines that GE provided for use aboard the *USS Turner*. *Id.* at 40–44.

ARGUMENT

I. MARITIME LAW DOES NOT SUPPORT LIABILITY FOR INJURIES ALLEGEDLY CAUSED BY PRODUCTS THE DEFENDANT DID NOT MAKE, SUPPLY, OR DISTRIBUTE.

The crux of Respondents' position is that "a manufacturer must warn end-users if its product is hazardous when used as intended." Resp. Br. 1. For purposes of this rule, Respondents identify the operative "product" as "the working machinery with its asbestos parts." *Id.* at 2–3. Both the factual and legal premises underlying this argument are mistaken: GE did not make, supply, or distribute asbestos parts, and even if maritime law included an "integrated product rule," that rule would not assist Respondents.

A. GE Provided Turbines To The Navy For The *USS Turner* Without Insulation.

Respondents argue that defendants in this case are liable because they "sold the asbestos parts with the original integrated product." Resp. Br. 29; see, *e.g.*,

id. at 8 ("Petitioners frequently supplied spare asbestos parts . . . for use with their machinery."). Indeed, Respondents refer repeatedly to "original asbestos" parts. *Id.* at 1, 2, 14, 31, 35. These assertions, however, do not apply (at least) to GE, which did not supply *any* asbestos for use with its turbines.

As GE has explained, "GE manufactured the steam turbines that served as the [*USS*] *Turner's* main engines and supplied shipboard electric power." GE Br. 2. GE "delivered the turbines with no thermal insulation" because "[t]he Navy required GE to supply turbines in bare-metal form without any insulation, asbestos or otherwise." *Id.* at 2, 5. It was "the Navy's shipbuilder" who "applied thermal insulation materials to certain external surfaces of the turbines after they were installed on the destroyer." *Id.* at 2. Later, "upon maintenance or overhaul," the Navy or the shipyard working on the *Turner* installed new insulation. *Id.* at 5. Thus, GE's turbines were "bare metal" when supplied, as the Navy required. As the district court held, "there is no evidence that GE manufactured or supplied the insulation to which Plaintiff was exposed." JA779. Respondents do not and cannot dispute any of this. They simply wish it away by not addressing GE's arguments or even citing GE's brief.

Respondents do assert in passing that "GE . . . required [its] turbines to be insulated with asbestos." Resp. Br. 7–8. But the record does not support that claim. Their argument rests entirely on a document entitled "General Specifications for Heat Retention Material." See DJA 1287.[1] As GE explained in the district court, this document reflects excerpts from a

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[1] "DJA" refers to the Joint Appendix in the initial *DeVries* appeal (No. 15-1278). See GE Br. 5 n.2.

GE specification for heat retention material for *land-based* steam turbines used in power plants. DJA 274. It does not refer to turbines manufactured for Navy ships according to Navy specifications. *Id.* Further, on its face, the specification was "issued" on April 15, 1960, DJA 1288—roughly *15 years after* GE manufactured and supplied the turbines for the *USS Turner*. See GE Br. 2, 5. As the district court explained, even accepting that the specification "indicates that asbestos insulation should be used with turbines," JA779, it does not support the argument that "Plaintiff was exposed to asbestos from a product manufactured or supplied by [GE]," JA780. Nor does it support Respondents' claim that GE's turbines "incorporated asbestos parts and could not work without them." Resp. Br. 1. Indeed, DeVries testified that he had "no knowledge" who "selected" the "insulation [that] was put on the turbine on the [*Turner*] at the time of its initial installation in 1945." JA260. Accordingly, there is simply no competent evidence to support Respondents' assertion.

Respondents also ignore GE's showing that the Navy, not GE, specified the insulation materials for the *Turner*'s turbines: The Navy "specified the types of thermal insulation and lagging for piping and machinery," including "for steam propulsion turbines." JA106; see GE Br. 5. Indeed, Navy materials "specifically addresse[d] the type and thickness of external thermal insulation (block, felt, and blanket) applied to turbines and other equipment." JA107. Respondents' claim that GE (or any other defendant) required asbestos insulation for the turbines it supplied for the *Turner* is foreclosed by the "strict Navy control and supervision over all aspects of the turbines' design and manufacture." DJA113; see GE Br. 4–5.

B. There Is No "Integrated Product Rule" In Maritime Law.

Contrary to Respondents' argument, *East River Steamship Corp.* v. *Transamerica DeLaval, Inc.*, 476 U.S. 858, does not support their claim that "[m]aritime law holds that a product is the entire 'integrated package,' including its asbestos parts and maintenance manual." Resp. Br. 29 (bold omitted).

In *East River Steamship*, a turbine built by the defendant malfunctioned, damaging the turbine itself but no other parts of the plaintiff's ship. 476 U.S. at 860. The question was whether the buyer could bring a maritime-law products-liability claim "when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss," or whether a breach-of-warranty claim was the only remedy. *Id.* at 859. The Court concluded that because "each turbine was supplied by [the defendant] as an integrated package," "each is properly regarded as a single unit," and thus the complaint should be construed to allege "injury to the product itself." *Id.* at 867. On that basis, the Court held that "no products-liability claim lies in admiralty when the only injury claimed is economic loss" from the product's malfunction. See *id.* at 868, 876.

East River Steamship did not adopt any "uniform integrated package rule," and said nothing about "asbestos parts [or] maintenance manual[s]." Resp. Br. 29. The issue was "whether injury to a product itself may be brought in tort," and the "integrated package" discussion served merely to show that "there was no damage to 'other' property." 476 U.S. at 867–68. The Court explained that each turbine was "properly regarded as a single unit" because that is how it was "supplied by" the manufacturer. *Id.* at 867.

Here, of course, GE supplied only the *Turner*'s turbines and did not make, supply, or sell the insulation that allegedly harmed DeVries. As such, under *East River Steamship*'s definition of "product" for maritime law, GE's products were the turbines it made and supplied, and *not* the insulation separately supplied and installed at the behest of the Navy. See *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 520 U.S. 875, 884 (1997). That is, "equipment added to a product after the Manufacturer . . . has sold the product to an Initial User *is not part of the product* that itself caused physical harm." *Id.* (emphasis added).

That conclusion likewise follows from the lower court decisions that have addressed the relevant "product" under maritime law, for both strict-products-liability and negligence purposes. For example, in *Lindstrom* v. *A-C Product Liability Trust*, the Sixth Circuit considered whether a pump manufacturer could be liable for the plaintiff's exposure to asbestos contained in "products from another company that were attached to [the defendant's] product." 424 F.3d 488, 496 (6th Cir. 2005). The court held that a manufacturer "cannot be held responsible for the asbestos contained in another product." *Id.* That rule is correct and wholly consistent with established principles of products-liability law. See GE Br. 18–21.

Respondents argue that *Lindstrom* (and its progeny) should be "limited to strict products liability, and has no bearing on negligent failure to warn claims." Resp. Br. 39. That is incorrect. *Lindstrom* explained that "Plaintiffs in products liability cases under maritime law may proceed under both negligence and strict liability theories," and "[u]nder either theory, a plaintiff must establish causation." 424 F.3d at 492. Thereafter, the Court rejected Plaintiffs' claims be-

cause there was insufficient evidence of exposure to defendants' products to support causation. *E.g.*, *id.* at 494 ("[I]t would have been impossible for Lindstrom to have handled any original packing or gasket material attributable to [Defendant] Henry Vogt"). *Lindstrom* correctly applies bedrock products-liability principles to hold that a manufacturer "cannot be held responsible" for injuries caused by a product it did not make or supply, *id.* at 496, and this Court should embrace the same rule.

II. THE THIRD CIRCUIT'S RULE NEEDLESSLY CREATES INCONSISTENCY AND UNPREDICTABILITY.

The Third Circuit rejected a "rule-based approach" in favor of a "standard-based approach" that admittedly was "bound to be less predictable and less efficient." Pet. App. 11a–12a. It held that "a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials *if the facts show the plaintiff's injuries were a reasonably foreseeable result* of the manufacturer's failure to provide a reasonable and adequate warning." *Id.* at 15a (emphasis added). Respondents cannot reconcile that open-ended and amorphous standard with maritime law's "traditions of simplicity and practicality," *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959), and the federal interest in "uniform rules of conduct," *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674–75 (1982).[2]

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[2] Respondents misunderstand the purpose of maritime law's uniformity requirement. The goal is not for every legal doctrine to apply to the same extent in every situation (Resp. Br. 4), but to establish "uniform rules of conduct" that offer meaningful guidance to parties ordering their affairs, *Foremost Ins. Co.*, 457 U.S. at 674–75, and permit "relative predictability" in their ap-

A. Maritime Law Does Not Support Liability Based Solely On "Foreseeability."

Respondents say, citing *MacPherson* v. *Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), that the Third Circuit's foreseeability-based rule reflects "[t]raditional principles of tort law [that] impose a duty to warn of foreseeable dangers of a product." Resp. Br. 46. But *MacPherson* itself was "the origin of what is now called 'Products Liability.'" *Liberty Mut. Ins. Co.* v. *Hercules Powder Co.*, 224 F.2d 293, 295 (3d Cir. 1955). *MacPherson* eliminated the requirement of privity and recognized a duty of care to the general public. See 111 N.E. at 1051. And it is in this precise context—"products-liability law, where there is a duty to the public generally"—that this Court has ruled that "*foreseeability is an inadequate brake*" on liability for maritime law claims. *E. River S.S.*, 476 U.S. at 874 (emphasis added). For that reason, products-liability claims are limited to defendants who made, sold, or distributed the product at issue. See *Lindstrom*, 424 F.3d at 496; *O'Neil* v. *Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012) (rejecting the imposition of liability "when[ever] it is foreseeable that [the] products will be used in conjunction with defective products or replacement parts made or sold by someone else").[3]

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plication, *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

[3] None of the authorities Respondents cite for this claim (at 46–48) imposes liability for injuries caused by a product the defendant did not make, sell, or distribute. *See Waters-Pierce Oil Co.* v. *Deselms*, 212 U.S. 159, 165–66 (1909) (defendant oil company was the "vendor" of the harmful "mixture of coal oil and gasoline"); *Sieracki* v. *Seas Shipping Co.*, 149 F.2d 98, 99 (3d Cir. 1945) (applying "the principles in *MacPherson*" in case against shipbuilder for defective shipboard equipment), *aff'd*, 328 U.S. 85 (1946); *Restatement (Second) of Torts* § 388 (1965)

Nor can Respondents' rule be justified by common-law negligence principles. The "traditional common law elements of negligence" are "duty, breach, foreseeability, and causation." *Adams* v. *CSX Transp., Inc.*, 899 F. 2d 536, 539 (6th Cir. 1990); see Dan B. Dobbs et al., *The Law Of Torts* § 124 (2d ed. 2018). Respondents argue that it is "hornbook law" that "duty arises from . . . foreseeability" (Resp. Br. 47), but countless cases say that "foreseeability alone does not give rise to a duty." *Huggins* v. *Citibank, N.A.*, 585 S.E.2d 275, 277 (S.C. 2003).[4] Even Respondents' own cases acknowledge that a "court cannot recognize a duty based entirely on the foreseeability of the harm at issue." *In re N.Y.C. Asbestos Litig.*, 59 N.E.3d 458, 470 (N.Y. 2016); *accord May* v. *Air & Liquid Sys. Corp.*, 129 A.3d 984, 990 (Md. 2015). Indeed, if foreseeability alone were sufficient, "a manufacturer of hammers, foreseeing injured fingers and thumbs, would be liable for every such injury." *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066, 1070 n.9 (4th Cir. 1974). That is not the law.

There are good reasons for this rule. Liability based solely upon foreseeability "would make all manufacturers the guarantors not only of their *own* products, but also of each and every product that could conceivably be used in connection with or in the vicinity of their product." John W. Petereit, *The Duty*

(party is liable for harm caused by an expected use of a "chattel" that the party "supplies").

[4] *Accord O'Neil*, 266 P.3d at 1005; *Little* v. *Utah State Div. of Family Servs.*, 667 P.2d 49, 54 (Utah 1983); *Lance* v. *Senior*, 224 N.E.2d 231, 233 (Ill. 1967); *see also Restatement (Second) of Torts* § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product, HarrisMartin Columns: Asbestos, Aug. 2005, at 4. "Such a duty would impose an excessive and unrealistic burden on manufacturers," *O'Neil*, 266 P.3d at 1006, and expand the scope of liability far beyond that authorized by Congress in related contexts, see GE Br. 33–34.

Respondents accuse Petitioners of "claim[ing] that foreseeability has no place in maritime negligence law," Resp. Br. 2, and contend that this Court has had "no difficulty" applying "a foreseeability analysis across a wide spectrum of cases, largely operating to limit, rather than expand, liability," *id.* at 36, 51. That misunderstands the issue and GE's argument. GE does not seek to eliminate "foreseeability" as a relevant factor under maritime law. Foreseeability, applied in conjunction with the traditional requirements of duty, breach, and causation, properly operates to address claims involving "extraordinary" and "unexpected" outcomes. *E.g.*, *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 470 (2006). But where duty is subsumed as a separate element by the amorphous concept of foreseeability, the prospect of liability becomes, as this Court said in *East River Steamship*, "too indeterminate to enable manufacturers easily to structure their business behavior." 476 U.S. at 874; see GE Br. 18, 34. A foreseeability-only approach is the opposite of simple and uniform, as the cases that have attempted to apply it attest. See GE Br. 26–30.

As courts have long observed, "'foreseeability' as used in tort actions has always been both a confusing concept in principle and an elastic one in application." *Passwaters* v. *Gen. Motors Corp.*, 454 F.2d 1270, 1276 n.5 (8th Cir. 1972). "The difficulty is that 'foreseea-

bility' is a hazardous term to define in the abstract and, like so many other doctrines, must turn on the judgmental process." *Id.*; see also *Hall* v. *Atchison, Topeka & Santa Fe Ry.*, 504 F.2d 380, 385 (5th Cir. 1974) ("Few areas of tort law are as beset with the potential for confusion as is that of foreseeability."). Respondents' position presents the same problems, with no guardrails to prevent liability from expanding in unpredictable and unexpected ways. See GE Br. 26–27, 31–33.

B. The Third Circuit's Rule Is Neither Limited Nor Workable.

Contrary to the principles underlying maritime law, the decision below would breed complexity, inconsistency, and unpredictability. See GE Br. 26–31. Indeed, the court below conceded that its foreseeability-based rule "is bound to be less predictable and less efficient" than a standard that limits liability to parties who actually make or supply asbestos. Pet. App. 12a.

To downplay these effects, Respondents recast the decision below as something far more limited. But their arguments do not withstand scrutiny. Respondents first say the Third Circuit's "rule imposes a duty *only* when a manufacturer knew or reasonably could have known (1) that asbestos is hazardous; *and* (2) [that] 'its product will be used with an asbestos-containing part'" because such a part was incorporated into the product, specified by the manufacturer, or required for proper functioning. Resp. Br. 25 (first emphasis added). But the Third Circuit said the opposite.

That court explained that the factors identified "may or may not be the only facts on which liability can arise," and "cases will necessarily be fact-

specific." Pet. App. 15a–16a. The court further elaborated that "[t]he finer contours of the defense, and how it should be applied to various sets of facts, must be decided on a case-by-case basis." *Id.* at 16a. That is just the sort of "open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal," that this Court has rejected in maritime cases. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

Respondents next argue that "the Third Circuit's test is an 'inevitability' test that provides clear guidelines to courts and litigants." Resp. Br. 26, see *id.* at 23, 37. The Third Circuit said nothing of the sort. Rather, the "inevitability" language comes from *Quirin* v. *Lorillard Tobacco Co.*, 17 F. Supp. 3d. 760, 769 (N.D. Ill. 2014)—a district court decision that has spawned confusion and disagreement among courts that have tried to apply it. See GE Br. 29–30. Here, too, Respondents offer no response. Put simply, "reasonable foreseeability" is not the same as "inevitability," as Respondents elsewhere recognize. See Resp. Br. 50 ("This is not just foreseeability; it is inevitability.").

Finally, Respondents argue that "the Third Circuit held that there is no duty *unless* petitioners knew (1) of the hazards of their asbestos, and (2) that their products 'will be used with an asbestos-containing part' because of *active conduct* on the part of the manufacturer." Resp. Br. 5 (second emphasis added); see *id.* at 22 (the test "deals with foreseeability, but based only on active *conduct* by the manufacturer"). The Third Circuit, however, ruled that "foreseeability" alone is the "touchstone," Pet. App. 15a, and Respondents' arguments provide no greater clarity. "Active conduct," they say, is any "action that would

cause the user of the machine to be exposed to asbestos." Resp. Br. 22. That simply collapses the question of duty with the question of causation, which already (as Respondents elsewhere concede) turns largely on foreseeability. *Id.* at 51.

C. A "Clear Majority" Of States Has Not Adopted Plaintiff's Proposed Rule.

Respondents contend that a "clear majority of the states adopt the same rule as the Third Circuit," and this Court should follow suit. Resp. Br. 41. That is wrong. Respondents cite only three state high court decisions allegedly supporting their rule. See *In re N.Y.C. Asbestos Litig.*, 59 N.E.3d 458; *May* v. *Air & Liquid Sys. Corp.*, 129 A.3d 984; *Macias* v. *Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012). Even if Respondents' lower state-court decisions and federal-court *Erie* predictions are included, the number of states would expand to seven. See Resp. Br. 41–42. That is a far cry from a "clear majority of the states."

Moreover, a number of these decisions would not support liability in this case. For example, Respondents emphasize that in *Braaten* v. *Saberhagen Holdings*—which declined to hold manufacturers of equipment installed on Navy ships liable for "asbestos insulation that was [later] applied by the [N]avy," 198 P.3d 493, 496 (Wash. 2008)—the Washington Supreme Court did not decide whether a duty to warn arises where a manufacturer specifies or incorporates a harmful part. Resp. Br. 43. But here "there is no evidence that GE manufactured or supplied the insulation to which Plaintiff was exposed," JA779, and the record does not support any claim that GE specified that asbestos was to be used with the turbines supplied for the *USS Turner*. Although the Washington Supreme Court subsequently "held

that respirator manufacturers were liable for exposure to asbestos dust from products they did not sell" (Resp. Br. 44), that is irrelevant because (unlike GE's turbines) "the respirators . . . were specifically designed to and intended to filter contaminants from the air breathed by the wearer, including asbestos." *Macias*, 282 P.3d at 1076.[5]

Likewise, in *Schwartz* v. *Abex Corp.*, the district court predicted that Pennsylvania law would not impose either strict or negligence-based liability on a manufacturer where an "engine was placed by the manufacturer into the stream of commerce" that "did not have any external asbestos insulation installed on it and was not supplied by the engine manufacturer with accompanying asbestos insulation." 106 F. Supp. 3d 626, 660–61 (E.D. Pa. 2015); see also *Schaffner* v. *Aesys Techs., LLC*, No. 1901 EDA 2008, 2010 WL 605275, at *6 (Pa. Super. Ct. Jan. 21, 2010) ("a manufacturer cannot be held liable under theories of strict liability or failure to warn for a product it neither manufactured nor supplied"). Again, GE would not be liable under this rule.

Finally, Respondents cannot distinguish *O'Neil* v. *Crane Co.*, where the California Supreme Court held that manufacturers of valves and pumps used on an aircraft carrier owed no duty to warn the plaintiff of asbestos contained in "external insulation and internal gaskets and packing, all of which were made by third parties and added to the pumps and valves postsale." 266 P.3d at 991. Respondents argue that

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[5] Respondents' claim that "*Braaten*'s continued viability is questionable, at best" (Resp. Br. 44) is meritless. *Macias* said that, while *Braaten* predated Washington's product liability statute, it was "still relevant" because it illuminated the "same common law principles" that controlled in *Macias*. 282 P.3d at 1074.

O'Neil acknowledged a "stronger argument for liability" if the asbestos part was a required component or replaced an "identically defective" original part. *Id.* at 996 n.6. But that does not describe GE's products here. And *O'Neil* cautioned that, even in that scenario, "the policy rationales against imposing liability on a manufacturer for a defective part it did not produce or supply would remain." *Id.*

III. MARITIME LAW'S SPECIAL SOLICITUDE FOR SAILORS DOES NOT WARRANT MASSIVELY EXPANDING LIABILITY HERE.

Respondents contend that the "special solicitude" for sailors requires "giving rather than withholding the remedy in this case." Resp. Br. 34. Special solicitude for sailors does not, however, support imposing liability against every possible defendant. Rather, this doctrine is relevant primarily in determining whether a plaintiff has a cause of action under maritime law in the first place. See, *e.g.*, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970) (relying on the "special solicitude" for sailors to recognize a new cause of action for wrongful death); cf. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (rejecting the "special solicitude" to expand scope of remedies available for wrongful death). Here, established common-law principles, incorporated into existing maritime law, permit sailors to seek recovery from the parties that actually made, sold, or distributed the asbestos that allegedly harmed them. See GE Br. 18–22. Sailors should be more than adequately protected by those undeniably available sources of relief.

Expanding liability to encompass manufacturers like GE is not necessary to ensure that plaintiffs receive "compensation that is closer to what they deserve." Pet. App. 13a; Resp. Br. 58. As Respondents

acknowledge, maritime law recognizes joint and several liability (Resp. Br. 18), and thus a sailor-plaintiff may sue "all the wrong-doers, or any one of them, at his election," and "is entitled to judgment in either case for the full amount of his loss," *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n.7 (1979) (quoting *The Atlas*, 93 U.S. 302, 315, (1876)); see *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 220 (1994). A maritime plaintiff injured by asbestos exposure can seek to recover the entire amount of his loss from *any individual defendant* that manufactured, sold or distributed the asbestos that allegedly harmed him.

This case makes the point. DeVries' lawsuit named 62 defendants that allegedly caused the injuries stemming from his exposure to asbestos. He alleged that many of those defendants "sold asbestos products" or "sold asbestos-containing" products. Complaint, *DeVries* v. *Allen Bradley Co.*, No. 5:13-cv-00474-ER (E.D.P.A. July 2, 2013), ECF No. 168. If, as he alleges, DeVries was injured by exposure to asbestos produced or sold by those defendants, then the "bare metal" rule is no obstacle to claims seeking the entirety of his damages against those entities. No special solicitude is warranted because the "bare-metal" rule does not leave Respondents without recourse, but instead focuses their efforts on the defendants that actually produced, sold, or distributed the product alleged to cause harm.[6]

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[6] There are also other mechanisms to ensure recovery for sailors injured by asbestos. As GE explained, asbestos plaintiffs may file claims with dozens of asbestos trusts funded with tens of billions of dollars in assets. GE Br. 42–43. Respondents have no answer to this point. And while some of Respondents' *amici* contend that an individual plaintiff is likely to recover only a small amount from a given trust (Br. of *Amici Curiae* Multiple

Further, extending liability to defendants for failure to warn about products that they neither made, sold nor distributed would be destructive of sailor safety by promoting redundant or inconsistent warnings that contradict other manufacturer's or the Navy's instructions. See GE Br. 36–38. And, in all events, the special solicitude cannot be pursued at all costs; it must be applied with an eye toward maritime law's equally important goals of uniformity, simplicity and fairness. *Id.* at 36. The Third Circuit's rule cannot be reconciled with these goals, for the reasons explained above.

IV. RESPONDENTS' PROPOSED EXPANSION OF LIABILITY IS INCONSISTENT WITH THE NAVY'S PLENARY CONTROL OVER NAVAL SHIPS AND EQUIPMENT.

Respondents cannot dismiss the Navy's then-state-of-the-art knowledge of the dangers of asbestos, its promulgation of safety orders and warnings about asbestos, and the steps it took to reduce asbestos exposure while balancing other military priorities. GE Br. 23–26. Indeed, the "Navy was intimately involved with both the labeling of equipment on its ships and the manufacturer-produced information that was allowed to accompany any product." *Faddish* v. *Gen. Elec. Co.*, No. Civ. A. 09-70626, 2010 WL 4146108, at *8 (E.D. Pa. Oct. 20, 2010). This control "included the decision of what warnings should or should not be included." *Id.* at *7. "[U]nless expressly directed to do so by the Navy, GE was not permitted, under the specifications, associated regulations and procedures, and the actual practice as it existed

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Veterans Organizations 34), that is misleading; any given plaintiff is likely to recover from numerous trusts. Injured service personnel also may file claims for their service-related injuries with the Veterans Administration. GE Br. 43–44.

in the field, to affix any type of warning to a Navy turbine that addressed alleged hazards of products." *Id.* (alteration in original). The same was true as to the "texts of instruction manuals, and every other document relating to the construction, maintenance, and operation of the vessel," all of which "were approved by the Navy." *Id.* Indeed, an equipment manual is not permitted onboard a Navy warship until approved by the Navy—in which case it becomes the Navy's manual, and is even emblazoned with the Navy's insignia. Not a word may be changed in these manuals without the Navy's permission. See GE Br. 25; JA 76, 80.

Respondents offer no persuasive response. They insist that the Navy somehow "required petitioners to warn users of their machines of the dangers they would face, including asbestos dust." Resp. Br. 16. This claim conflicts with the record, with the conclusions of other courts, and with common sense: Because every single maintenance manual was "approved by the Navy," *Faddish*, 2010 WL 4146108, at *7, Respondents' contention would require this Court to conclude that the Navy approved every single maintenance manual for the equipment at issue *by mistake*. That would be the only way to reconcile Respondents' simultaneous claims that (a) the "maintenance manuals and machine labels did not warn of the hazards of breathing asbestos dust," and (b) the Navy required such warnings. Resp. Br. 9, 16.[7]

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[7] Some *amici* observe that the Navy has, in litigation with asbestos suppliers, denied that its specifications prohibited asbestos warnings. Br. *Amici Curiae* of Evelyn Hutchins et al. 9. That is irrelevant, since the "contract specifications" at issue there were for asbestos itself, not turbines. *See GAF Corp.* v. *United States*, 932 F.2d 947, 950 (Fed. Cir. 1991).

Given that the Navy approved decades' worth of manuals, all of which Respondents now claim were non-compliant, the only sensible explanation is that the Navy did not in fact require such warnings. See JA 77, 80. In truth, the Navy chose to instruct and warn Navy personnel concerning asbestos by means other than putting an identical warning in hundreds of different equipment manuals. See GE Br. 23–24 (describing Navy warnings and procedures for asbestos). Respondents attempt to brush aside this point because "the government contractor defense" recognized in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), "is not before this Court," Resp. Br. 57. But the Navy's control is relevant not only to the government-contractor defense, but also because it illustrates the absurdity of the open-ended duty to warn that Respondents propose: Any rule that would permit liability in *these* circumstances would not further of goals of maritime law and thus ought not be adopted. Indeed, the Navy's control over shipboard equipment and warnings refutes Respondents' claim that manufacturers of non-asbestos equipment like GE are "best positioned to avoid the loss" of injuries caused by asbestos. Resp. Br. 53.

CONCLUSION

For these reasons, and those in GE's opening brief, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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